



JUDGES MATTER

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Supreme Court of Appeal

Interview of Judge A Schippers

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CJ M. Mogoeng: Judge Schippers I apologise to you that I was not here when you came in. Good morning to you.

Judge A. Schippers: Good morning, Chief Justice.

CJ M. Mogoeng: Are you well?

Judge A. Schippers: I am well thank you.

CJ M. Mogoeng: Are you relaxed?

Judge A. Schippers: Well as relaxed as I can be.

CJ M. Mogoeng: All right, okay. Now, you hold two Masters Degrees. One from UCT the other from Harvard. Is that correct?

Judge A. Schippers: That is correct, Chief Justice.

CJ M. Mogoeng: I noticed that you practised in the US, for how long?

Judge A. Schippers: For just one year.

CJ M. Mogoeng: One year.

Judge A. Schippers: Yes.

CJ M. Mogoeng: And how did you become a member of the New York Bar even as a Judge?

Judge A. Schippers: Well I took the New York Bar exam while I was in the United States and you can only take the exam when in fact you have an American qualification, so my Harvard qualification entitled me to take the exam. And I am a member, I am still a member of the New York Bar but not a practising member. And the New York Bar authorities allow us by virtue of – even as Judges to remain members as long as we pay our dues. So I do that bi-annually. And I am also exempted from the continuous legal education, which is a requirement in the US by virtue of the fact that I am on the Bench.

CJ M. Mogoeng: But while you were practising was it a rewarding experience?

Judge A. Schippers: It was a tremendously rewarding experience, Chief Justice because I was exposed to International Law, something which I had never done. I worked at a firm in Washington DC called Fullbright and Jaworski. Leon Jaworski was the prosecutor in the Watergate scandal and at the time, and that was in 1990, 1991 I should say it was the emergence of the so-called mega firm which is now become synonymous also with South Africa where you have mega firms in South Africa. The firm had four offices, it is a Texas-based firm; four offices in Texas: one in

Washington DC; one in Riyadh Saudi Arabia; one in Geneva and one in London. I worked in the office in Washington DC in the International Law Department where I gained experience working on the North American free trade agreement between Canada, the US and Mexico which you would have seen recently Donald Trump wants to get rid of as fast as possible.

CJ M. Mogoeng: Briefly how did that contribute in sharpening your forensic skills?

Judge A. Schippers: Well Chief Justice, I was fortunate to have been also at Harvard and having had no training but observing trial advocacy and my forensic skills were particularly sharpened in practice because on International Law I had never been exposed to what happens when you negotiate contracts, when you negotiate treaties and it also helped me coming to the Bar in dealing with issues I was fortunate to get one case from this State Attorney regarding the finding a foreign vessel with a gill net or a trawl net which was illegal under our law.

CJ M. Mogoeng: I noticed that practising at the Cape Bar you rose to the leadership position.

Judge A. Schippers: That is correct Chief Justice.

CJ M. Mogoeng: Did that responsibility enable you to contribute to the transformation of the Bar and if so how?

Judge A. Schippers: Well I was, strange that you, it is an interesting progression, so I will keep my answer brief. I applied for membership of the Cape Bar as a member and I was asked by various members because it was time for transformation, and I am talking now 1995, 1996 thereabout. Strangely I was not elected to the position. I could not understand it and only after the 50/50 situation was [inaudible] when we insisted upon equal representation, when we insisted upon equal governance the answer was always well you are not – you do not have the numbers and of cause the short answer to that was, we do not have the numbers because historically we were prevented from having the numbers. We did not come from backgrounds where we had uncles or fathers who were Judges or people in the profession that helped us

to the Bar. At the time when I started at the Bar, there were only about 20 of us, but we insisted on equal governance as was the position also in the GCB. So it was a national progression from there. And one of the first challenges, when I became chairperson, was that there was a racism report written by the JP at the time to the then Minister of Justice, Miss Mabandla. And in dealing with that and I am sure the President of the SCA will identify with this; is that I immediately convened a conference on gender sensitivity and race sensitivity and the opening guest speaker was Justice O'Regan. And we had a number of Judges that attended that conference and it was a start to get people to think differently about race and gender, particularly at the Cape Bar. So my progression then was first as Vice Chairperson and then Chairperson for two terms.

CJ M. Mogoeng: Did that enable you to contribute in some way to the transformation of the Bar?

Judge A. Schippers: Absolutely Chief Justice, we started for example under my watch and that of my predecessor the third junior project where we would engage a third junior and a fee sharing arrangement. We also had a policy under my watch when we had the provision made for women Advocates when they go on maternity leave that there would be relaxed Bar dues, there would be relaxed floor dues, there would be relaxed rental payable for persons simply because they were not in the same position as males. We could all go and carry on with our practices but they, female particularly, were prejudiced and took a knock when, in fact, they went home to have children. So, and there are members, of course, in this body who can attest to that. My policy was always, to empower black women. I can tell you that in the some, ten or so years, that I practised as a silk I practised only with black women juniors. I have one white junior and that was foisted upon me by the attorney. For the rest, it was my policy to – because I am hard on skills. I am hard on advancing particularly black women advocates and providing them with skills and creating a pool of excellence. And I am pleased to say that in a limited way I was able to contribute.

CJ M. Mogoeng: You sound relaxed now, when were you appointed permanently as a High Court Judge?

Judge A. Schippers: I was appointed on the 15th of February 2013, Chief Justice.

CJ M. Mogoeng: So you have been a High Court Judge for about five years?

Judge A. Schippers: Correct, Chief Justice.

CJ M. Mogoeng: How was your experience as an Acting Judge of the Supreme Court of Appeal. Did you find it to be a welcoming environment? What do you have to say about the SCA as a place of work?

Judge A. Schippers: I must say that I always had a very collegial – it was a very collegial and very friendly environment that I encountered. Let me say immediately I found that a very hard job, that job is not easy.

CJ M. Mogoeng: Yes.

Judge A. Schippers: And you will appreciate Chief Justice when you write a judgement and you mull over it and you agonise over it and you read it once, you read it a hundred times. You see if something cannot be said better. You make sure that you do not have contradictions between certain paragraphs, that is not an easy job.

CJ M. Mogoeng: Yes.

Judge A. Schippers: But I must say that when I wrote my first judgement I, in fact, said to colleagues, here is the judgement please give me your comments and in brackets and criticisms. I was quite happy if somebody came to me and said well what do you think you were doing here? I really did not have that difficulty and I got on exceptionally well with colleagues and I can tell you it is an extremely pressurised environment. Let me give you a simple example, next term we have twelve cases. Each one of us will have twelve cases. I am assigned to write three judgements. Some are assigned two, some are assigned three. It is pressure and you got to get it right. And you write for the rest of the country. And you must make sure that

whatever you say is right on principle. So to answer your question; I had a very friendly environment. I am aware that of course there were others that did not, and I do not for one second want to suggest that that is the perception. It is very real for some people as President Maya has referred previously to this body prior to the conference that she had on race and gender sensitivity in January, in the first term I should say. In February of 2017. I asked her whether I could attend the conference, but it was only open to permanent Judges. But it is a very collegial atmosphere, there is an open-door policy you can go to colleagues you can discuss matters. If you run into difficulty you can ask and one attribute I think that one needs in that place is that you must be teachable. The day you say I actually have arrived is the day you hang up your robes. So, I had this policy that if I do not know something I would ask.

CJ M. Mogoeng: President Maya.

PRES M. Maya: Thank you, Chief Justice. Good morning Justice Schippers.

Judge A. Schippers: Good morning, President Maya.

PRES M. Maya: Tell me this, you are from the Cape Flats?

Judge A. Schippers: Yes.

PRES M. Maya: How did a young man from that background rise to the heights that you have reached? How did you not end up in a gang?

Judge A. Schippers: It is a very appropriate question. I come from Bridgetown which is on the Cape Flats, it is a township similar to Hanover Park or Manenberg. It is separated by the N2 from Langa. I was one of seven children; I am one of seven children, three boys and four girls. My father had no education. My father was a cutter in the leather industry and my mother was a housewife. As recently as a week ago, Justice Maya, I was discussing with my brother and we were laughing about the fact that we never lived as siblings alone, ever. And that was because there was always somebody else who needed a home. Let me give you a simple example; I

had two cousins their mother was tragically killed, and my parents took them in. My father worked for them, they raised them as his own. And we worked out that over the years there was something like fourteen people that lived with us in a two-bedroom house in a township. Of course growing up was easy and it is interesting that you refer to gangs, because I had a friend and out respect for his family I shall refer to him as "John". John was very talented, he was a brilliant soccer player. He was a brilliant gymnast. I, in fact, I envied him, but one day when I came home from youth, it was a Saturday night it was about eleven o'clock John had gone off the rails and there John was busy attacking somebody with a knife. I went to him and I intervened and said; you can't do this. He had already inflicted two wounds on the stomach and we were able to go to a shopkeeper and phone an ambulance and get the injured person to hospital Sadly about a year or two after that John was shot dead by the police. He was wanted for robbery and rape. Now, you may ask how does one overcome this kind of odds and Chief Justice I can summarise it in two words: "God's grace". I was grateful to have a mother who taught me three things that I will never ever forget. The first is dependence on God. She had a famous text and some of you will appreciate the revised standard version. It is Psalm 121; I lift up my eyes to the hills from whens cometh my help? My help comes from the Lord. So she taught me dependence on the God. The second thing she taught me was to pray. And I could even in a practice call on her and ask her for prayer, and she would say hold the phone let me pray. When I had a difficult case, whether I was in practice or whether I was on the Bench. The third thing she taught me was that your character and not your circumstances define you. So I started out at UWC Justice Maya, and then I had to leave because I was there for two years and reminisced about a week ago, two weeks ago with a senior colleague at the SCA, we did Latin together, and there was no money, so you had to hike to University regularly. And it was really tough and that year the University shooed me for my fees. I remember that time there was still imprisonment for civil debt. I had not complied with payment of the fees and I landed in the Deputy Sheriffs Office to go to, waiting at three o'clock, to go to Pollsmoor Prison if nobody comes with money. I phoned my sister and she sent somebody and it was a rude awakening because around me were people, fathers and family men who were there for debt and who were going to be imprisoned because they had not paid and we're going to spend whatever days, fifteen or twenty days in Pollsmoor. I left UWC and went to the University of Cape

Town because I got a bursary. But because the curriculum was different, Chief Justice and President Maya, I had to take an extra year and I was allowed to do two and a half courses, and they gave me a bursary in the princely sum of R400.00. We are talking now 1980. After one month of attending lectures three times a week, I went to them and said I am sorry I cannot waste a year, it is too long I need to finish my degree. So I registered with UNISA that March and I did five and a half courses that year and the following year did another four courses and finished the BProc. I went back to UCT to do the LLB but then I was offered articles and that was two years, and then I did that. And while doing articles I finished my LLB and then after that, I did the LLM, that was also part-time. And my first stint back at full-time study was when I got the Fullbright scholarship to go to Harvard. So in a nutshell that is my story.

PRES M. Maya: You are still very involved in work with disadvantaged communities and you do a lot of community outreach work, not so? And you mentor troubled youth and that kind of thing?

Judge A. Schippers: That is correct President Maya I have, in fact, started two things. One is I regularly go to my High School I am often the guest speaker at their matric graduation ceremonies and we were part of an alumni group, so we continue to encourage people from the community. The second thing is that a week ago, or rather a few months ago I joined up with a Ministry called "Lamp Post Ministry" and what Lamp Post does is that they go to street corners and they put out chairs with tables and soup and the idea is to have conversations with people. And interestingly I went to one in Bridgetown where I grew up and we chat to people and inevitably there is somebody in the group that has the same experience as some difficulty of a member of the community. It is a way of spreading the Gospel, it is a way of really reaching out to the community and going to – taking the Gospel to them which they otherwise would not hear. I have as a result of they had discussion a few months ago and I am going to meet on Thursday coming with somebody who is involved in Hanover Park and this is a part of the Pentecostal Church they have a project called CeaseFire which is a technical project based on Chicago, on the US where they can determine where gunfire is erupting or where shots had been fired. They then send in what they call interrupters to defuse the situation and to mediate between rival

gangs. I have spoken to him because I want to start the Lamp Post Ministry in Hanover Park and in doing so I was told as recently as last night that there is a new project called, "Character Company" and that project is trying to deal with intervention before people slip through the cracks. In other words children, boys of five to ten years old are then mentored by three, by adults. Three boys are mentored by adults to prevent them from coming into conflict with the Law. So the Lamp Post Ministry hopefully in Hanover Park will be launched shortly, where we again go to street corners, talk to people and share the Gospel with them. Pray with them and so forth. I should also say that the Minister of the Church to which this project is linked has indicated to me that whenever they go into the township, or they do what they call a prayer walk where they simply just go into the various houses ask people if they need help and pray with them. They found that people have said it is quiet, the community is a bit calmer when you are here. So it does make a difference and I hope to get involved to a greater extent in that Ministry. And then as you know with my brother who is a Baptist Minister for the last forty years we have a project in Kenya where we work to train women and pastors in scripture and in theological training.

CJ M. Mogoeng: Before the Presidents next questions now that I am confident you are relaxed is you could be as brief as possible. If more detail is required there will be a follow-up.

Judge A. Schippers: I will be Chief, thank you, chairperson.

CJ M. Mogoeng: Thank you.

PRES M. Maya: Does your involvement in this kind of work ever interfere with the execution of the Judicial function?

Judge A. Schippers: No, it does not Justice Maya. As you will be aware that when we, it is an extremely pressurised environment. Judgement have to get out and I have never ever had a situation where, in fact, I have been called upon, particularly at the SCA where I have been for five terms now, to produce a judgement because it is long outstanding or because there has been any delay.

PRES M. Maya: Thank you, Chief Justice.

CJ M. Mogoeng: Thank you, President. Commissioner Malema?

COMM J. Malema: Covered.

CJ M. Mogoeng: Covered. Minister?

MIN M Masutha: Thank you, Chief Justice. Good - is it morning or afternoon – Justice Schippers.

Judge A. Schippers: Good afternoon Minister.

MIN M Masutha: Is it still morning? Justice Schippers, I recently observed a presiding officer who at the end of that observation I said, there goes a taskmaster and only realised that person was you. And that was a matter where you almost send counsel packing for poor preparation of their papers and not even having read some of the documents etcetera. What is your view about what the Judge should or should not do in cases where counsel or a legal practitioner does their client a disservice by shortchanging them in that manner? Is it sufficient to just reprimand the counsel in Court or is there something more to ensure that ultimately justice is served on those that deserve it?

Judge A. Schippers: Minister to answer your question there is, of course, you do reprimand counsel in Court. The difficulty that have is that unprofessional conduct does not necessarily encompass slackness and laziness, but I think that for the most part, I have always tried to even – and it cost nothing to actually speak to the practitioner afterwards. And if I do find it is a – the case has been really badly presented and that it warrants it I would make mention of that and hope that it does not happen again. Because ultimately and particularly when it comes to counsel who represents the government. Because ultimately it is taxpayers' funds that are on the line.

MIN M Masutha: I am asking this because there is a perception that certain Judges are a little bit too hard on counsel. Do you think that in a situation where counsel is basically not doing their job the Judge is well within their right to be hard on them? Or is there some degree of restraint that Judges should exercise?

Judge A. Schippers: Well to answer your question Minister you must obviously treat counsel, it goes without saying, civilly. But it does not – one of the easiest thing to do is to say quite civilly and have the debate and when the debate, as the debate proceeds counsel will soon get the message that they are being of no assistance to the Court.

MIN M Masutha: And finally my third question relates to transformation at the Cape Bar in particular. I need not give you the stats, but it is clear that there is wilful underrepresentation before we even talk about silk status.

Judge A. Schippers: Yes.

MIN M Masutha: When it comes to race and gender.

Judge A. Schippers: Yes.

MIN M Masutha: Now a quarter of a century down the line, what is it, put aside what has already been spoken of sufficiently on the role of the State, can you just for a moment reflect for me on what actually happens in the profession itself in terms of inclusivity. Do you believe that the profession is doing enough to ensure that when white counsel gets work it brings women in, it brings junior black people in? What is the situation in your own experience?

Judge A. Schippers: Well I am not very familiar with the situation particularly at the Cape Bar, but I can say this, and it is a well-known fact because I have seen this also at the SCA. The perennial problem Minister is briefing patterns and also making sure that skills are imparted. Because I find sometimes even among black counsel they do not engage black women juniors. And it is extremely difficult for these people to develop practices. Speaking for myself I regularly go to UWC and always

encourage final year LLB students. I normally do it almost annually to come to the Bar, to make sure that there is equal representation. That is one thing, but for them to survive they need work. And the problem is always been that briefing patterns were skewed.

MIN M Masutha: Thank you, Chief Justice.

CJ M. Mogoeng: Thank you, Minister. Judge President Jappie?

JP A. Jappie: Thank you, Chief Justice. Well good morning.

Judge A. Schippers: Good morning Judge President.

JP A. Jappie: You know it is said when one gets appointed to the Bench you take your background with you.

Judge A. Schippers: Yes.

JP A. Jappie: When puisne Judges normally talk about the approach of the SCA compared to that of the Constitutional Court we often say, well the approach of the SCA is the approach of black letter lawyers and the approach of the Constitutional Court infuses elements of equity in Law. Bearing in mind your background where would you say you would come down Judge Schippers?

Judge A. Schippers: I would say I come down firstly on the side of upholding the Constitution. That is the oath of office that I take. That is the law the supreme law that I am duty bound to uphold and apply. I would not say that I am a black letter lawyer, but what I would say is that I have always striven to if I do err on the side of the Constitution. And I think that particularly when I started out in 1993 when we were just about to become a democracy the striking thing to me was that many Judges did not have what I would call a constitutional mindset. If you have a constitutional mindset it colours and it shapes and it infuses your judgements and you will make sure that whatever you do is compatible with the constitution. I do not

for one second say that your background does not influence the way you think, but ultimately if the loadstar it the Constitution then I do not think you can go wrong.

CJ M. Mogoeng: Thank you JP. Commissioner Ntlama?

COMM N. Ntlama: Thank you, Chief Justice. Good day Judge.

Judge A. Schippers: Good day Commissioner.

COMM N. Ntlama: How are you?

Judge A. Schippers: I am well thank you.

COMM N. Ntlama: Yes. In your questionnaire, you made reference to your LLM thesis which has been published at UCT.

Judge A. Schippers: Yes.

COMM N. Ntlama: What qualifies as a publication?

Judge A. Schippers: Well I suppose if it was of the nature that it deserved publication then they would publish it. And secondly if simply put there were fund available. And Suco at the time provided the funds.

COMM N. Ntlama: So was it published as a book or as an article?

Judge A. Schippers: No, it was only published as a dissertation like everybody else dissertations. It is not really a fully blown publication.

CJ M. Mogoeng: Thank you Prof. Commissioner Masuku?

COMM T. Masuku: Thank you, Chief Justice. Good afternoon Judge Schippers.

Judge A. Schippers: Good afternoon Commissioner.

COMM T. Masuku: Judge Schippers we have shared many cases, as your junior in Cape Town and as a black junior in Cape Town, I found a brother in you. And not a brother that would let the attribute of impartiality in adjudicating your application here, but you were prepared to help black juniors, not just from appreciating the cultural alienation that we experienced in the environment of the Western Cape Bar. As your junior, I remember one moment you even wrote me a letter, a formal letter, under your letterhead because I delayed to give you Heads of Arguments which I needed to give to you as early as possible and that is how rigorous you were about and how serious you are about taking them. But the most important question I really want to ask is, what do you consider to be a non-negotiable attribute of an Appellant Judge? Snd of those that you identify which one would you consider to be your particular attribute that you would bring to the Supreme Court of Appeal should you be appointed?

Judge A. Schippers: I think the most important non-negotiable attribute is that you must uphold - is that you must maintain your independence fiercely. Secondly, you must apply the Constitution as effectively as you can. And thirdly, you must treat litigants and practitioners civilly. I can tell you that in previous years, and I can say this without any fear of contradiction that particularly under the Presidentship of Justice Maya that this is significantly abated and, in fact, does not happen. But previously people would say this when they appeared in the SCA, that they were dismembered by a Judge. That is not good. It is wrong. And litigants must be treated civilly, counsel must be treated civilly, and I think one of the characteristics of a Judge is humility and teachability. And I hope to bring that to the Bench and also to be of assistance when it comes to Acting Judges. For example, struggling with writing judgements and so forth. Because it is an institution that we are there to protect. It is the integrity of the institution and its honour that must be maintained.

COMM T. Masuku: Thank you, Chief Justice. Thank you.

CJ M. Mogoeng: Thank you so much Commissioner Masuku. Commissioner Singh?

COMM N. Singh: Thank you, Chief Justice. Good day, Judge Schippers.

Judge A. Schippers: Good day, Commissioner.

COMM N. Singh: Thank you. I note that you have been appointed Judge in 2013

Judge A. Schippers: Yes.

COMM N. Singh: But you have been Acting from 1998, so that is a long stint that you have had in Acting. And that you are Acting Judge of the Supreme Court from November 2016 to now. Have you relocated to Pretoria? Are you still resident in Cape Town? And how do you manage the travelling? And how will, if you are appointed it impact on your family life?

Judge A. Schippers: Well what we normally do, I have been in the SCA for five terms and I understand that it is going to be until the third term of this year. What I do is what most of my colleagues do, Commissioner. And that is that we live at our homes and we live in Bloemfontein for the time of the court sitting. So I understand that it is something like five months of the year. So recess we will take all our records, go home, read them – and may I say this, there is a perception that when Judges go on recess they go on holiday; that is not so. In fact, you have to start reading all your judgements for the next term. As I have indicated, the next terms start on the 1st of May and all the reading must be done before then.

COMM N. Singh: Well if it is any comfort the same perception applies to us, members of Parliament. When they say recess time and journalist are here, they know, when we say we are going on recess for two months, meanwhile we will be hard at work in our constituencies. My second question relates to the fact that there are a number of cases that take far too long to be finalised in Courts -

Judge A. Schippers: Yes.

COMM N. Singh: -- Especially High Court level. What do you feel are the main causes for some of the delays and what can be done to ameliorate these conditions?

Judge A. Schippers: I think one of the main causes of the delays, Commissioner, is the fact that there are not effective case management. There is not effective case management in that Court. The Chief Justice introduced case management a few years ago and I can say in the Western Cape it has worked. For example, you can get a trial date quite soon because what I use to do for example in the Road Accident Fund Matters, on a Friday I would go through something like thirty or forty files. Make sure that the case is ready. Make sure that all the procedures that need to be followed and that can be disposed of so that only the Court deals with what is in issue. All of that can be done before the time. That happens both in criminal and in civil courts and I think the answer is really effective case flow management.

COMM N. Singh: Thank you, Chief Justice.

CJ M Mogoeng: Thank you, Honourable Singh. Commissioner Notyesi?

COMM N. Notyesi: Thank you, Chief Justice. Judge, it is a question around the judgement you made, of course, this matter was later on dealt with. You made a finding that the powers of the Public Protector were not binding and that led to interpretation in the society the politician, after upon reflection and having regard to the subsequent decisions of the High Court and of the SCN Constitutional Court; what would reflections would you make? In relation to whether those that hold the view that you actually have over that were correct?

Judge A. Schippers: Well you are talking obviously about the DA versus SAB case and the powers of the Public Protector. My starting point was that it was modelled on the ombudsman and that was based on a decision by the Constitutional Court and the certification judgement. I said that the Public Protector's powers were not binding and held that – by the same token I held that they were not mere recommendations and had to be followed unless there was a rational basis to depart from them. Both the SCA and the Constitutional Court said I was wrong and I accept that, and that is why Commissioner I granted leave to Appeal because I knew it is a topical question. It is a difficult question and another Court might come to a different finding. And can I just make this last comment; it also illustrates that our system of Appeals works. So

that when a High Court Judge gets it wrong the SCA and the Constitutional Court can correct it and that I take as a positive from that judgement.

COMM N. Notyesi: Thank you. Now my last question. It relates to the application of the Customary Law.

Judge A. Schippers: Yes.

COMM N. Notyesi: Customary Law is the leading law, it is the Law of our people but there is a tendency to relegate the Customary Law into an inferior law and also in the application you find that there is an infusion of the Principles of Common Law to Customary Law. What could be your advice in the course of applying Customary Law where it finds application?

Judge A. Schippers: Commissioner you raise an important point that Customary Law has been neglected. Previously as you correctly point out there was a branch of the Common Law but Section 211, I think, of the Constitution makes it clear that Courts must apply Customary Law when that law is applicable subject to the Constitution and any legislation that specifically deals with Customary Law. So yes Customary Law is a body of Law that must be allowed to develop and thrive.

CJ M. Mogoeng: Thank you so much. Judge Schippers, you are excused.

Judge A. Schippers: Thank you, Chief Justice. Thank you, Commissioners.